IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 927 of 1980
with
FIRST APPEAL NO. 569 OF 2000

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DAYALAXMI@ KASHIBEN A.PATEL, SINCE DECEASED THRO'HER HEIRS
Versus
HARIPRASAD @ HARIKRISHNA AMBA-LAL

Appearance:
1. First Appeal No. 927 of 1980
MR MC SHAH for appellants
MR SURESH S PATEL for Respondent
2. First Appeal No. 569 of 2000
MR SURESH S PATEL for appellant
MR MC SHAH for respondents

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 27/06/2002

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

Plaintiff, Hariprasad @ Harikrishna Ambalal Pandit, filed Civil Suit No.3360 of 1978 in the City Civil Court, at Ahmedabad, claiming relief of partition of immovable properties and accounts of Hindu Undivided Family and has claimed 1/3rd share in the properties of Hindu Undivided Family from the defendants who are, mother Dayalaxmi @ Kashiben Ambalal Pandit and brother, Devendra Ambalal Pandit. The learned City Civil Judge, Ahmedabad, on 30th April 1980 passed a preliminary decree declaring that the plaintiff and the defendants are having 1/3rd share each in the immovable property described in Schedule-A along with the properties described in Schedule-B and Schedule-C except the gold and silver utensils and gold ornaments and jewelry described in Schedule-C. The matter was referred to the Commissioner for Taking Accounts for submitting the report as per the directions given in the preliminary decree. The said judgment and order was challenged in appeal being First Appeal No.927 of 1980.

It appears that during the pendency of the appeal, the original defendant No.1 Dayalaxmi expired on 6.8.1988. Plaintiff Hariprasad Ambalal Pandit, therefore, raised a claim asking for 1/2 share in the property of deceased Dayalaxmi stating that she died intestate. Defendant No.2 Devendra Pandit challenged the claim of the plaintiff stating that deceased Dayalaxmi had executed a Will dated 15.12.1977 in his favour whereunder she bequeathed her entire share in his favour. It appears that this Court remitted the matter to the trial Court for de-novo trial, by its order dated 15.4.1994. Plaintiff Hariprasad challenged the said order by way of SLP No.14953 of 1994, before the Supreme Court of India. In the said SLP, the Supreme Court by its order dated 1.5.1995 directed the trial Court to give a finding with respect to the Will, after recording the evidence and after inquiring into the truth and validity of the said Will. It was further directed that after recording the evidence, the trial Court shall send its findings to the High Court with respect to the Will. Thereupon the High Court will take up the appeal and dispose it of in accordance with law.

In pursuance of the directions of the Supreme Court, the trial Court by its order dated 28.2.1997 has held that defendant No.2 who propounds the will has

proved his legality and validity. As per the directions of the Apex Court, we are required to consider the order dated 28.2.1997 passed by the trial Court in the present appeal.

It may be stated that plaintiff Hariprasad Pandit also filed Regular Civil Suit No.6552 of 1988 for a declaration that the alleged Will dated 15.12.1977 of deceased Dayalaxmi is illegal by contending that deceased Dayalaxmi has not executed any Will in her life time and the so-called Will dated 15.12.1977 purported to have been executed by her is a forged Will. The trial Court relying on the order dated 28.2.1997 dismissed the suit by its order dated 17th April 2000. The plaintiff has challenged the said judgment and order dated 17th April 2000 by filing appeal being First Appeal No.569 of 2000.

2. We have decided to hear both the appeal together and heard learned Counsel appearing for the parties. Learned Counsel Mr.M.C.Shah appearing for the appellants in First Appeal No.927 of 1980 has fairly conceded before us that the appellants do not challenge the judgment and decree dated 30th April 1980 passed by the City Civil Court, Ahmedabad in Civil Suit No.3360 of 1978, wherein it was declared that the plaintiff is entitled to 1/3rd share in the properties of Hindu Undivided Family from the defendants. Mr.Shah has further stated that even though original defendant No.2 has proved the legality, validity and genuineness of the Will dated 15.12.1977 executed in his favour by his mother deceased Dayalaxmi bequeathing the entire property in his favour, defendant No.2 Devendra Pandit and other heirs of deceased Dayalaxmi will restrict their claim to the extent of 1/3rd share in the properties of Dayalaxmi, which she was otherwise entitled to bequeath.

In view of the above statement, plaintiff Hariprasad who has succeeded in the suit filed by him is entitled to claim 1/3rd share of the Hindu Undivided Family and since defendant No.2 has succeeded in proving the Will, he is entitled to have 2/3rd share of the Hindu Undivided Family. This finding recorded by us is in conformity with the observations of the Apex Court in the SLP No.14953 of 1994 and therefore nothing further is required to be done in these appeals.

3. We, therefore, allow First Appeal No.927 of 1980 partly by confirming the judgment and decree passed by the trial Court to the extent that the plaintiff is entitled to 1/3rd share in the Hindu Undivided Family. We further hold that the defendants will be entitled to

2/3rd share of the Hindu Undivided Family. The decree be drawn accordingly. The Commissioner for Taking Accounts is directed to effect partition at the ratio of 1/3rd in favour of the plaintiff and 2/3rd in favour of the defendants and legal heirs of deceased Dayalaxmi as per the directions given by the trial Court with respect to the properties mentioned in the Schedule attached to the plaint except Bungalow Nos.15 and 16, situated in Jyotikapark Society, Shahibaug, Ahmedabad which are not included in the Schedule as they are already partitioned by the father of the plaintiff and defendant No.2 whereby the said Bungalows were given to plaintiff and defendant No.2 respectively.

In view of the fact that the dispute between the parties is pending since long, the Commissioner for Taking Accounts shall give top-most priority and shall effect the partition at the earliest and in no case, later than 31st December 2002.

In view of the above, First Appeal No.569 of 2000 now no more survives and the same is accordingly disposed of. Considering the facts and circumstances of the case, there will be no order as to costs. The parties shall bear the same.

The Record and Proceedings of Civil Suit No.3360 of 1978 be sent to the trial Court, i.e. City Civil Court, Ahmedabad, forthwith.

(Kshitij R. Vyas, J.)

(Kamal M. Mehta, J.)

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